

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
MARITEL, INC.)	
)	
Request to Extend Construction Deadline for	)	File Nos. 0001252148, 0001252156,
Certain VHF Public Coast Station Geographic	)	0001252177, 0001252214, 0001252257,
Area Licenses	)	0001252280, 0001252315, 0001252325,
	)	0001252334
)	
Request to Extend Construction Deadline for	)	File Nos. 0002173639, 0002173600,
Certain VHF Public Coast Station Geographic	)	0002173635, 0002173613, 0002173620,
Area Licenses	)	0002173608, 0002173617, 0002173628,
	)	0002173596, 0002173651, 0002173652,
	)	0002173653, 0002173654, 0002173655,
	)	0002173656, 0002173657

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 2007

Released: July 24, 2007

By the Commission: Commissioner Adelstein issuing a statement.

I. INTRODUCTION

1. In the instant *Memorandum Opinion and Order*, we address matters pertaining to two separate requests by MariTEL, Inc. (MariTEL) for waivers of the construction deadlines applicable to MariTEL's licenses for the nine maritime VHF Public Coast (VPC) Service Areas (VPCSA).¹ We have before us, first, an Application for Review (*AFR*) filed by the United States Coast Guard (Coast Guard) on January 5, 2004.² The *AFR* seeks review of a decision by the Public Safety and Critical Infrastructure Division (Division), Wireless Telecommunications Bureau (Bureau),³ granting a request by MariTEL for a waiver and two-year extension of the five-year construction requirement (also referred to as a build-out or substantial service requirement) for the maritime VPCSA licenses. We also have before us a second request by MariTEL, filed May 25, 2005, seeking a further extension of the construction deadlines for its

¹ The nine maritime VPCSA's roughly correspond with U.S. Coast Guard Districts. The regions served are Northern Atlantic (VPCSA 1), Mid-Atlantic (VPCSA 2), Southern Atlantic (VPCSA 3), Mississippi River (VPCSA 4), Great Lakes (VPCSA 5), Southern Pacific (VPCSA 6), Northern Pacific (VPCSA 7), Hawaii (VPCSA 8), and Alaska (VPCSA 9). There are also thirty-three inland VPSCAs. See 47 C.F.R. § 80.371(c)(1)(ii).

² Application for Review filed by United States Coast Guard (Jan. 5, 2004) (*AFR*). MariTEL filed an Opposition to Application for Review on January 20, 2004 (*Opposition*), and the Coast Guard filed a Reply to MariTEL's Opposition to Application for Review on January 30, 2004 (*Reply*).

³ MariTEL, Inc., *Order*, 18 FCC Rcd 24670 (WTB PSPWD 2003) (*Waiver Order*). The Commission reorganized the Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division (PSPWD) were assumed by the Public Safety and Critical Infrastructure Division (PSCID). See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003). The *Waiver Order* was adopted by PSPWD, but released by PSCID.

maritime VPCSA licenses, as well as for its seven inland VPCSA licenses.⁴ In the interest of administrative convenience, we address the *AFR* and the *Second Waiver Request* in consolidation.⁵ For reasons discussed below, we deny the *AFR* and affirm the *Waiver Order*, and we also conditionally grant the *Second Waiver Request* in part, but also deny it in part and dismiss it in part. As a consequence of our decisions herein, MariTEL is conditionally provided an additional one year from the release date of this *Memorandum Opinion and Order* in which to demonstrate compliance with the five-year construction deadlines for its VPCSA licenses that remain unconstructed as of this date.

II. BACKGROUND

2. VPC stations are commercial mobile radio service (CMRS) systems that allow ships to send and receive messages and to interconnect with the public telephone network.⁶ VPCSA licensees such as MariTEL⁷ are required to demonstrate that they are providing substantial service in their respective licensed service areas within five years of the initial license grant, and again within ten years of the initial license grant.⁸ The five-year construction date for MariTEL's maritime VPCSA licenses was

⁴ Request for Rule Waiver and Extension of Construction Deadline filed by MariTEL, Inc. (May 25, 2005) (*Second Waiver Request*). The Coast Guard filed an Opposition to the *Second Waiver Request* on July 20, 2005 (*Opposition to Second Waiver Request*), and MariTEL filed a Reply to the *Opposition to Second Waiver Request* on August 1, 2005 (*Reply to Opposition to Second Waiver Request*). Pursuant to the Public Notice requesting comment on the *Second Waiver Request*, the Coast Guard's *Opposition to Second Waiver Request* was due on or before July 6, 2005. See Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Request to Further Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Public Notice*, 20 FCC Rcd 10731 (WTB 2005) (*Second Waiver Request PN*). However, on June 28, 2005, the Coast Guard filed a Motion for Extension of Time (*Coast Guard Motion*) seeking an additional two weeks, until July 20, 2005, to comment on the *Second Waiver Request*. We hereby grant the *Coast Guard Motion*, and accept the *Opposition to Second Waiver Request* into the record. Grant of this extension does not adversely impact any party to this proceeding. We note that the Coast Guard represents in the *Coast Guard Motion* that counsel for MariTEL had indicated that MariTEL would not interpose any objection to the brief extension. See *Coast Guard Motion* at 2. We likewise grant MariTEL's request to accept its *Reply to Opposition to Second Waiver Request*, which was filed on August 1, 2005, well after the July 18, 2005 deadline for reply comments specified in the *Second Waiver Request PN*. See *Opposition to Second Waiver Request* at 1-2 n.3. MariTEL could not file its *Reply to Opposition to Second Waiver Request* until after the Coast Guard filed its *Opposition to Second Waiver Request* on July 20, 2005. MariTEL represents that counsel for the Coast Guard had indicated that the Coast Guard would not interpose any objection to the late submission of the *Reply to Opposition to Second Waiver Request*. *Id.* No other party commented on the *Second Waiver Request*.

⁵ See 47 C.F.R. § 0.5(c) (providing in pertinent part that "the staff is at liberty to refer any matter at any stage to the Commission for action, upon concluding that it involves matters warranting the Commission's consideration ..."). Given our determination to consolidate and address jointly the *AFR* and the *Second Waiver Request*, we need not address the Coast Guard's argument that the Commission should act on the *AFR* prior to taking action on the *Second Waiver Request* because to do otherwise could amount to a *de facto* denial of the *AFR*. See *Opposition to Second Waiver Request* at 2; see also *Reply to Opposition to Second Waiver Request* at 4 (arguing that it is not essential that the Commission act on the *AFR* prior to addressing the *Second Waiver Request*).

⁶ 47 C.F.R. § 80.5; Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853, 19856 ¶ 3 (1998) (*Third Report and Order*).

⁷ The nine maritime VPCSA licenses are held by separate wholly-owned subsidiaries of MariTEL. For convenience, we refer to the licensees simply as MariTEL, except when citing to licensee-specific filings.

⁸ See 47 C.F.R. § 80.49(a)(1). Substantial service is defined as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." *Id.* For maritime VPCSA's, the Commission has stated that the five-year substantial service requirement can be satisfied by coverage to one-third of the major waterway(s) in the service area, and the ten-year substantial service requirement can be satisfied by coverage to two-thirds of the major waterway(s) in the service area. See *Third Report and Order*, 13 FCC Rcd at (continued....)

May 19, 2004. The five-year construction date for MariTEL's inland VPCSA licenses was October 9, 2006.

III. DISCUSSION

A. MariTEL's First Waiver Request

3. Background. On March 27, 2003, MariTEL filed its request for a waiver and a two-year extension of the five-year construction date for the nine maritime VPCSA licenses.⁹ MariTEL stated that it initially anticipated constructing a VPC ship-to-shore voice communications network to satisfy the construction requirement, but that the availability to the maritime community of cellular and personal communications services (PCS) had drastically reduced demand for VPC voice communications services.¹⁰ MariTEL further stated that it now planned to construct a VPC data network to offer services such as automatic vessel location, short messaging, and electronic mail to the maritime community.¹¹ MariTEL added that it needed additional time to build out the data network, and therefore requested the waiver and two-year extension.¹² According to MariTEL, the only way it could meet the five-year construction deadline without the waiver and extension would be by continuing to build out its voice network.¹³ MariTEL argued that it would not serve the public interest if it were effectively forced to construct a voice network that would be of little utility to mariners, solely for the purpose of meeting the construction deadline.¹⁴

4. On December 4, 2003, the Division released the *Waiver Order*, granting MariTEL's request and extending MariTEL's initial construction deadline for two years, until May 19, 2006. The Division concluded that MariTEL had demonstrated that the requested waiver was warranted under Section 1.925(b)(3)(ii) of the Commission's Rules.¹⁵ Specifically, the Division determined that MariTEL had demonstrated unique or unusual circumstances by virtue of the dramatic drop in its subscriber base and call volume due to the increasing availability and decreasing costs of competing voice services.

(...continued from previous page)

19870 ¶ 34. For inland VPCSAs, the Commission has stated that the five-year substantial service requirement can be satisfied by coverage to one-third of the population in the service area, and the ten-year substantial service requirement can be satisfied by coverage to two-thirds of the population in the service area. *Id.* at 19871 ¶ 36.

⁹ See FCC File Nos. 0001252148 (Call Sign WPOJ538), 0001252156 (Call Sign WPOJ531), 0001252177 (Call Sign WPOJ537), 0001252214 (Call Sign WPOJ533), 0001252257 (Call Sign WPOJ535), 0001252280 (Call Sign WPOJ532), 0001252315 (Call Sign WPOJ534), 0001252325 (Call Sign WPOJ536), 0001252334 (Call Sign WPOJ530), Request for Rule Waiver and Extension of Construction Deadline (filed Mar. 27, 2003) (*First Waiver Request*).

¹⁰ *Id.* at 2-4.

¹¹ *Id.* at 7.

¹² *Id.* at 9.

¹³ *Id.* at 11.

¹⁴ *Id.* The Division sought public comment on the *First Waiver Request*. See Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Public Notice*, 18 FCC Rcd 9325 (WTB PSPWD 2003). Comments were filed by the Coast Guard, and reply comments were filed by MariTEL and the United States Department of Transportation (DOT).

¹⁵ See 47 C.F.R. § 1.925(b)(3)(ii) (providing that the Commission may grant a waiver of the Wireless Radio Service Rules if it is shown that "in view of unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative").

These circumstances supported MariTEL's contention that a voice-based public coast service was no longer economically viable.¹⁶ The Division also agreed with MariTEL that it would be counterproductive to require MariTEL to complete construction of a voice network – inasmuch as the maritime community's demand for voice communications services apparently was largely being met by other CMRS providers – especially if it would foreclose MariTEL from constructing a network that could provide innovative data services.¹⁷ In addition, the Division clarified, in response to Coast Guard and DOT concerns, that its grant of the waiver and extension was not intended to prejudice questions pertaining to the use of VPC spectrum for Automatic Identification Systems (AIS),¹⁸ or to authorize any operations by MariTEL that could interfere with maritime safety or homeland security.¹⁹

5. In its *AFR*, the Coast Guard argues that the Division's decision is inconsistent with the Commission's goal of ensuring efficient use of the VPC spectrum and avoiding the warehousing of that spectrum.²⁰ Observing that MariTEL indicated that it had not provided any VPC service since June 2003,²¹ the Coast Guard says that neither the failure of MariTEL's business plan to offer voice communications service nor MariTEL's belief that it can effectively compete only by offering data services merits affording it additional time to meet the first build-out requirement.²² According to the Coast Guard, the competition that MariTEL faces in the voice market was foreseeable in 1999 when MariTEL acquired its maritime VPCSA licenses, and MariTEL unreasonably delayed consideration of alternative business plans.²³ The Coast Guard adds that MariTEL can utilize existing technology to provide a data service to the maritime community, if that is now its business plan, and MariTEL accordingly should not be allowed to retain the spectrum for an additional two years without providing

¹⁶ *Waiver Order*, 18 FCC Rcd at 24671 ¶ 6.

¹⁷ *Id.* at 24672 ¶ 8. The Division also noted that granting a two-year construction extension for MariTEL's maritime VPCSA licenses would bring the build-out deadline for those licenses close to the October 9, 2006 deadline applicable to MariTEL's inland VPCSA licenses. *Id.* at 24671-72 ¶ 7.

¹⁸ AIS is a maritime navigation safety communications system standardized by the International Telecommunication Union that provides vessel information, including the vessel's identity, type, position, course, speed, navigational status and other safety-related information, automatically to appropriately equipped shore stations, other ships, and aircraft. See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 04-344, 19 FCC Rcd 20071, 20074 ¶ 5 (2004) (*AIS NPRM*). In the *AIS NPRM*, the Commission proposed to designate VHF maritime Channels 87B (161.975 MHz) and 88B (162.025 MHz) exclusively for AIS on a wideband simplex basis throughout the nine maritime VPCSAs. See *id.* at 20088-89 ¶ 30. Those two channels are among the channels authorized for VPC use by MariTEL. MariTEL opposed the Commission's proposal because of the potential interference to MariTEL's proposed VPC operations, not only on Channels 87B and 88B but also on the adjacent spectrum licensed to MariTEL. On July 24, 2006, the Commission issued a *Report and Order* in the *AIS Rulemaking Proceeding*, designating Channels 87B and 88B for exclusive AIS use in the maritime VPCSAs and otherwise amending the Part 80 rules substantially as proposed in the *AIS NPRM*. See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order*, WT Docket No. 04-344 & PR Docket No. 92-257, 21 FCC Rcd 8892 (2006) (*AIS Report and Order*, *AIS FNPRM*, and *AIS 4th MO&O*, respectively, and, collectively with the *AIS NPRM*, the *AIS Rulemaking Proceeding*).

¹⁹ *Waiver Order*, 18 FCC Rcd at 24672-73 ¶¶ 9-10.

²⁰ *AFR* at 4 (citing *Third Report and Order*, 13 FCC Rcd at 19869 ¶ 33).

²¹ See *First Waiver Request* at 3 n.4.

²² *AFR* at 4-5; *Reply* at 2-4.

²³ *AFR* at 5; *Reply* at 4-6.

service.²⁴ Allowing MariTEL to retain the spectrum under these circumstances, the Coast Guard continues, in effect condones the warehousing of the spectrum and precludes its possible use for urgent public safety and homeland security requirements.²⁵

6. The Coast Guard also contends that MariTEL's determination to exit the voice communications market in order to pursue development of a data service is not a unique or unusual circumstance justifying a waiver.²⁶ The Coast Guard contends that MariTEL's circumstance reflects only a failed business plan, and that the Commission has repeatedly held that circumstances within the control of a licensee, such as a failed business plan, do not provide justification for a waiver of construction requirements.²⁷ The Coast Guard also argues that previous extensions of construction requirements for other licensees were granted in recognition of extenuating factors not present in MariTEL's case and for periods significantly shorter in duration than the two-year extension granted by the Division in the *Waiver Order*.²⁸ The Coast Guard also points to precedent denying extension requests where, as here, no existing service would be terminated or disrupted by reason of the denial.²⁹

7. In its *Opposition*, MariTEL contends that, in waiving construction deadlines, the Commission does not sanction the warehousing of spectrum, and that the Division did not do so in its *Waiver Order*.³⁰ MariTEL also argues that the Coast Guard's concerns about MariTEL's proposed use of its VPC spectrum are irrelevant to the question of whether an extension of MariTEL's construction deadline is appropriate, and observes that the Division made clear that the *Waiver Order* is not intended to prejudge spectrum allocation issues or other issues pertaining to the implementation of AIS in the United States.³¹ Finally, MariTEL asserts that the *Waiver Order* is consistent with Commission precedent, regulations and established policy regarding extensions of construction deadlines.³²

8. *Discussion.* Section 1.925 of the Commission's Rules provides that a waiver of the Commission's Rules may be granted if it is shown that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest or the applicant has no

²⁴ AFR at 6. As the Coast Guard notes, existing technology can be used to provide high-speed wireless services to the maritime community, *id.* at 6 & n.14, and such service currently is being offered by some high seas public coast stations.

²⁵ *Id.* at 7-8; *Reply* at 2. The Coast Guard adds that it is particularly inappropriate to allow MariTEL to retain the VPC spectrum on the basis of its desire to develop a data communications system because MariTEL provided insufficient evidence of its commitment to developing such a system and has offered little information regarding the proposed data service. *Reply* at 8-9.

²⁶ AFR at 8-15.

²⁷ See *id.* at 9 & n.21 (citing, e.g., Rock City Broadcasting, Inc., *Decision*, 52 FCC 2d 1246, 1247 ¶ 3 (Rev. Bd. 1975)).

²⁸ *Id.* at 11-12 (discussing Monet Mobile Networks, Inc., *Order*, 17 FCC Rcd 6452 (WTB CWD 2002) (*Monet Mobile Networks*), and Leap Wireless, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (WTB CWD 2001) (*Leap Wireless*)).

²⁹ *Id.* at 14 (citing Minnesota PCS Limited Partnership, *Order*, 17 FCC Rcd 17234 (WTB CWD 2002) (*Minnesota PCS*); Eldorado Communications, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (*Eldorado*)).

³⁰ *Opposition* at 5.

³¹ *Id.* at 8.

³² *Id.* at 9-16.

reasonable alternative.³³ We conclude that the Division correctly determined that MariTEL met the second prong of this standard.

9. It is settled Commission policy that an extension of time to construct generally is not justified when the licensee's failure to construct is due solely to circumstances wholly within the licensee's control.³⁴ Waivers extending a construction deadline, however, have been granted where changed circumstances affecting the business climate for an FCC-regulated service have caused the licensees in that service to reconsider the types of services they intend to offer or the technologies they intend to use. As noted by the Division,³⁵ for example, waivers of a construction deadline have been granted in the past to classes of licensees such as 218-219 MHz Service licensees.³⁶ This precedent was reasonably relied upon by the Division in granting the waiver and extension to MariTEL, which holds the geographic licenses for all nine maritime VPCSAs.³⁷ Thus, in contrast to the cases cited by the Coast Guard,³⁸ we are not presented here with a situation in which a licensee's request for additional time to construct authorized facilities is undermined by the fact that similarly situated licensees have managed to meet the same construction deadline.³⁹

10. We also agree with the Division that, given the apparent ability of cellular and PCS providers to generally satisfy demand for local⁴⁰ maritime public correspondence voice service, it would not serve the public interest to require MariTEL to build out an analog voice system simply to meet the construction requirement, when granting an extension of time to permit construction of a digital data

³³ 47 C.F.R. § 1.925(b)(3).

³⁴ See, e.g., 47 C.F.R. § 1.946(e); Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988, 8074 ¶ 177 (1994); Golden Eagle Communications, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 5127, 5129 ¶ 11 (1991), *recon. denied*, 7 FCC Rcd 1752 (1992).

³⁵ *Waiver Order*, 18 FCC Rcd at 24672 ¶ 8 & n.20.

³⁶ See, e.g., Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline, *Order*, 14 FCC Rcd 5190, 5194 ¶ 8 (WTB PSPWD 1999) (*218-219 MHz Waiver Order*).

³⁷ We note that there are also site-based incumbents licensed to provide service in the maritime VPCSAs but, unlike MariTEL, they were not subject to a substantial service requirement. The site-based licensees were subject only to a requirement to place the authorized station or frequencies in operation within twelve months of the license grant. See 47 C.F.R. § 80.49(a)(1).

³⁸ See *AFR* at 14 (citing *Eldorado* and *Minnesota PCS*).

³⁹ See *Eldorado*, 17 FCC Rcd at 24618-19 ¶¶ 12-13; Redwood Wireless Minnesota, L.L.C. and Redwood Wireless Wisconsin, L.L.C., *Order*, 17 FCC Rcd 22416, 22422 ¶ 11 (WTB CWD 2002) (*Redwood Wireless*). The Coast Guard also observes that MariTEL had indicated that it had stopped providing service of any kind using VPC spectrum, so, in contrast to other cases in which construction extensions were granted, no existing service would be terminated or disrupted if we deny MariTEL's waiver request. (As discussed *infra*, MariTEL subsequently notified the Commission that it has resumed the provision of voice communications service in seven of the maritime VPCSAs. See para. 16, *infra*.) While the public interest in avoiding service disruptions is one factor that may be considered by the Commission in determining whether to extend a construction deadline, the Commission has never held that the absence of a currently available service offering by the licensee should be determinative of whether an extension is warranted. (We disagree with the Coast Guard's interpretation of *Minnesota PCS*, 17 FCC Rcd at 17237 ¶ 8, as denying a construction waiver request solely for the reason that the licensee was not providing service at the time, see *AFR* at 14, because the decision expressly based the denial of the waiver on the "totality of the circumstances." *Minnesota PCS*, 17 FCC Rcd at 17237 ¶ 8.)

⁴⁰ VPC stations use VHF band frequencies to serve port areas, while high seas coast stations use low frequency, medium frequency, and high frequency band frequencies to serve vessels on the high seas, often hundreds or even thousands of miles from land. See, e.g., MariTEL, Inc. and Mobex Network Services, LLC, *Notice of Proposed Rule Making*, WT Docket No. 04-257, 19 FCC Rcd 15225, 15226 n.6 (2004).

network would maximize the efficient and effective use of the spectrum.⁴¹ Indeed, it was precisely such a consideration that was mentioned as one of the key factors supporting the waiver granted in *Monet Mobile Networks*.⁴² Although the Coast Guard argues that it was foreseeable when MariTEL acquired its licenses that it would face difficult competition from cellular and PCS licensees in offering voice service to the maritime community, the Division based its decision on the totality of the circumstances presented in the record and the public interest, consistent with other cases where waiver relief has been warranted.⁴³ Nor do we believe that these circumstances can fairly be said to have been solely under MariTEL's control in the same way that the relevant matters were under the control of the licensees that were denied construction waivers in the cases cited by the Coast Guard.⁴⁴

11. In sum, we believe that it was appropriate under the circumstances presented for the Division to waive Section 80.49(a)(1) of the Commission's Rules⁴⁵ and extend the five-year construction deadline with respect to MariTEL's maritime VPCSA licenses for an additional two years, until May 19, 2006. The increasing availability in recent years of alternative wireless communications services to meet this segment of the maritime community's demand for voice service at ever lower costs is a unique or unusual circumstance affecting the VHF Public Coast Service in maritime areas. In light of this development, it would be unduly burdensome to require MariTEL to meet its five-year construction deadline by investing further in a voice communications system for which the record indicated there was little demand. In addition, it serves the public interest to provide MariTEL with a reasonable period of additional time so that it may construct a network that could provide innovative data services that may be highly valued by the maritime community and others. We note, in this regard, that the Division expressly stated that it did not intend for this waiver and extension "to authorize any operations that could interfere with maritime safety or homeland security."⁴⁶ We reiterate this intention. In addition, we affirm and emphasize that the waiver granted to MariTEL is in no way intended to authorize MariTEL to make use

⁴¹ See *218-219 MHz Service Order*, 14 FCC Rcd 5194 ¶ 8.

⁴² See *Monet Mobile Networks*, 17 FCC Rcd at 6453 ¶ 4 ("[I]t would be counter-productive to require Monet to forgo deploying innovative, advanced, broadband services, which can be accomplished in the very near term, and to instead install equipment that would provide services that are nearly identical to those already provided in the markets"); accord *Leap Wireless*, 16 FCC Rcd at 19575 ¶ 7.

⁴³ See, e.g., *Monet Mobile Networks*, 17 FCC Rcd at 6453 ¶ 4. This precedent addresses cases where, as here, technological developments, competitive conditions, and changes in consumer demand militated in favor of shifting from analog service to digital service or otherwise employing a more advanced technology. What is difficult to predict, however, is precisely when such factors will, in combination, reach a critical mass impelling a licensee to change course, even at the expense of abandoning earlier efforts to deploy the less advanced technology.

⁴⁴ In *Eldorado*, the licensee sought a waiver to switch from TDMA to GSM technology because it wanted to enter into roaming agreements with larger carriers converting to GSM. Furthermore, the record indicated that the licensee may have experienced construction delays regardless of any conversion in technology and that the licensee failed to demonstrate diligence in satisfying its construction requirements. See *Eldorado*, 17 FCC Rcd at 24616-17 ¶¶ 7-8. In *Redwood Wireless*, the licensee claimed a need for additional time to construct due to contractual disputes with a management company, and was found not to be diligent in pursuing construction efforts. See *Redwood Wireless*, 17 FCC Rcd at 22419-20 ¶¶ 7, 9. In *Minnesota PCS*, the licensee requested a waiver because it had failed to secure an adequate tower site, a circumstance that Section 1.946(e)(2) of the Commission's Rules, 47 C.F.R. § 1.946(e)(2), expressly says may not be relied upon to justify a construction extension. See *Minnesota PCS*, 17 FCC Rcd at 17236 ¶ 5. Finally, in *Polycell Communications, Inc., Order*, 17 FCC Rcd 11909 (WTB CWD 2002), the licensee simply did not identify any causes beyond its control, or for that matter any causes at all, that prevented it from meeting the construction requirement. *Id.* at 11910 ¶ 4. In the instant case, in contrast, MariTEL's need for an extension is not attributable to a contractual dispute, a desire for a future contractual arrangement with fellow carriers, or an inability to acquire suitable antenna sites.

⁴⁵ 47 C.F.R. § 80.49(a)(1).

⁴⁶ *Waiver Order*, 18 FCC Rcd at 24673 ¶ 9.

of the VPC spectrum in a manner contrary to Commission rules or policy.

B. MariTEL's Second Waiver Request

12. *Background.* On May 25, 2005, while the *AFR* was pending, MariTEL filed its *Second Waiver Request*. In the *Second Waiver Request*, MariTEL asks that the Commission waive any substantial service deadlines applicable to its maritime and inland VPCSA licenses until the later of (a) two years from the date that the Commission's decision in the *AIS Rulemaking Proceeding*, in which the Commission proposed to designate VHF maritime Channels 87B and 88B for AIS,⁴⁷ "becomes final"; or (b) May 19, 2009, which is MariTEL's ten-year substantial service deadline for its maritime VPCSA licenses.⁴⁸ MariTEL claims that the pendency of the *AIS Rulemaking Proceeding* "creates uncertainty regarding the regulatory landscape under which MariTEL will be required to demonstrate that it is providing substantial service."⁴⁹ According to MariTEL, the frequencies available for its proposed VPC data network will not be determined until the Commission resolves the AIS spectrum designation question in the *AIS Rulemaking Proceeding*.⁵⁰ MariTEL also notes that the Commission is considering in the *AIS Rulemaking Proceeding* MariTEL's assertions that adoption of the Commission's proposal would cause harmful interference to MariTEL's operations, and to the operations of incumbent site-based VPC licensees, on channels adjacent to Channels 87B and 88B. MariTEL states, in this regard, that it "expects that the FCC will, in its decision determining whether VHF channels 87B and 88B will be used for AIS, address how MariTEL's operations will be protected."⁵¹ MariTEL also cites the pendency of the *AFR* as an additional source of uncertainty affecting MariTEL's operational plans.⁵²

13. As in the case of its *First Waiver Request*, MariTEL argues that a grant of the *Second Waiver Request* is warranted under the second prong of the Section 1.925 waiver standard, *i.e.*, that there are unique and unusual factual circumstances that would make application of the VPC substantial service rules to MariTEL inequitable and unduly burdensome, and that grant of the requested waiver would serve

⁴⁷ See n.18, *supra*.

⁴⁸ *Second Waiver Request* at 1-2.

⁴⁹ *Id.* at 7. In the *Second Waiver Request*, MariTEL seeks a waiver of the substantial service deadline for its seven inland VPCSA licenses as well as the nine maritime VPCSA licenses, arguing that the former also may be affected by the decisions adopted in the *AIS Rulemaking Proceeding*, notwithstanding that inland VPC stations do not serve maritime areas. *Id.* at 13-14. In support of this extension of the requested waiver relief, MariTEL observes that, in the *AIS Rulemaking Proceeding*, the Coast Guard is advocating that the designation of Channels 87B and 88B for AIS be on a nationwide basis, encompassing inland areas as well as the maritime VPCSA's. *Id.* at 14. MariTEL also asserts that it does not anticipate initiating service just for inland areas, so it should have a single build-out obligation applicable to both its maritime and inland VPCSA licenses. *Id.* MariTEL contends that, under these circumstances, harmonizing the substantial service deadlines for its maritime and inland VPCSA licenses is consistent with Commission precedent. *Id.* at 14-15.

⁵⁰ *Id.* at 7. As noted, on July 24, 2006, the Commission issued the *AIS Report and Order*, designating VHF maritime Channels 87B and 88B for exclusive AIS use in the maritime VPCSA's and otherwise amending the Part 80 rules substantially as proposed in the *AIS NPRM*. See *AIS Report and Order*, 21 FCC Rcd at 8904-08 ¶¶ 18-24. However, the question of whether to extend the exclusive AIS allocation of Channel 87B to the inland VPCSA's was not resolved in the *AIS Report and Order*. Instead, the Commission requested additional comment on this question, primarily but not entirely due to a desire for public input on issues pertaining to satellite AIS, in the *AIS FNPRM*. See *AIS FNPRM*, 21 FCC Rcd at 8933-35 ¶¶ 58-60. This question pertains only to Channel 87B. As a Federal Government channel, Channel 88B is under the jurisdiction of the National Telecommunications and Information Administration, which already has provided for a nationwide allocation of the channel for AIS. See *AIS Report and Order*, 21 FCC Rcd at 8896 ¶ 6 & n.25.

⁵¹ *Second Waiver Request* at 7.

⁵² *Id.*

the public interest.⁵³ According to MariTEL, the purpose of the substantial service benchmarks, to ensure that licensees actually construct systems rather than using the licenses as speculative vehicles, would not be undermined by grant of this further waiver because MariTEL already has made a significant investment toward build-out, spending hundreds of thousands of dollars to evaluate the maritime radiofrequency environment and to develop and test maritime data service technologies.⁵⁴ In addition, MariTEL contends that “[i]t is not economically prudent for MariTEL to build a system without knowing how the interference matters to be addressed in the AIS Proceeding will be resolved.”⁵⁵ MariTEL says that if it proceeds to build out its system during the pendency of the *AIS Rulemaking Proceeding*, it may be required to dismantle or significantly modify that system once the Commission definitively resolves the questions raised by MariTEL regarding the interference impact on VPC operations of wideband simplex AIS transmissions on Channels 87B and 88B.⁵⁶ MariTEL maintains that its circumstances are akin to those where the Commission has granted such extensions on the basis of regulatory uncertainty.⁵⁷ MariTEL adds that grant of its *Second Waiver Request* would be in the public interest, inasmuch as MariTEL would otherwise be forced to expend resources to construct facilities that are unlikely to be used, to the detriment not only of MariTEL but also to the potential customers of its proposed data network.⁵⁸

14. In its *Opposition to Second Waiver Request*, the Coast Guard incorporates by reference the arguments it makes in the *AFR*, objecting to MariTEL’s second request for an extension of time to construct for the same reasons it objects to MariTEL’s first such request.⁵⁹ In addition, it disputes MariTEL’s assertion of regulatory uncertainty. According to the Coast Guard, MariTEL should have proceeded with build-out of its data network in the expectation that the Commission’s proposals in the *AIS NPRM* would be adopted with little or no modification.⁶⁰ The Coast Guard also contends that MariTEL’s expectation that the Commission would adopt special interference protection criteria to protect MariTEL’s operations is unfounded because the record in the *AIS Rulemaking Proceeding* “clearly demonstrates that the Commission has considered MariTEL’s interference allegations and dismissed them, concluding that reasonable techniques currently exist to mitigate interference to MariTEL’s proposed operations.”⁶¹ MariTEL replies that the Coast Guard’s assertions that MariTEL does not in fact face regulatory uncertainty are based on a presumption that the Commission already had decided the issues raised in the *AIS Rulemaking Proceeding* at the time it adopted the *AIS NPRM*, which if true would render that proceeding “a charade” and “a sham,” and contravene the requirements of the Administrative Procedure Act.⁶²

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 9-10.

⁵⁵ *Id.* at 10.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 11-12 (citing *218-219 MHz Waiver Order*, 14 FCC Rcd at 5193-94 ¶ 8; *DTV Build-Out, Order*, 18 FCC Rcd 22705, 22711 ¶ 27 (2003) (*DTV Build-Out Order*)). MariTEL also states that the Commission has previously extended construction deadlines until matters regarding harmful interference could be resolved. *Id.* at 12-13 (citing *FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11079 ¶ 11 (2001), *recon. denied*, 17 FCC Rcd 16092 (2002)).

⁵⁸ *Id.* at 13.

⁵⁹ *Opposition to Second Waiver Request* at 2.

⁶⁰ *Id.* at 13-15, 20-25.

⁶¹ *Id.* at 15.

⁶² *Reply to Opposition to Second Waiver Request* at 3-11.

15. The Coast Guard also challenges MariTEL's contention that grant of the *Second Waiver Request* would serve the public interest, arguing that MariTEL has not demonstrated that its proposed data service would fulfill any market demand,⁶³ and that a further extension of MariTEL's substantial service deadlines would prolong the period in which this internationally interoperable maritime spectrum, for which there is a pressing need, remains unused.⁶⁴ MariTEL, however, counters that the Coast Guard's arguments regarding the public interest component of the waiver standard are irrelevant, and in particular that the Coast Guard's questioning of the economic viability of MariTEL's proposed maritime data service should not bear on the question of whether the *Second Waiver Request* should be granted.⁶⁵

16. Notwithstanding the *Second Waiver Request*, on June 2, 2006, MariTEL filed notifications of construction for the seven maritime VPCSA licenses covering areas in the continental United States: WPOJ530 (Northern Atlantic),⁶⁶ WPOJ533 (Mid-Atlantic),⁶⁷ WPOJ534 (Southern Atlantic),⁶⁸ WPOJ535 (Mississippi River),⁶⁹ WPOJ531 (Great Lakes),⁷⁰ WPOJ536 (Southern Pacific),⁷¹ and WPOJ532 (Northern Pacific).⁷² MariTEL represents in each of these notifications that it satisfied its five-year substantial service requirement for the pertinent VPCSA as of May 19, 2006, the applicable five-year deadline as extended by the *Waiver Order*, by providing coverage to one-third of the major waterways in the VPCSA.⁷³

⁶³ *Id.* at 22-23.

⁶⁴ *Opposition to Second Waiver Request* at 26-28.

⁶⁵ *Reply to Opposition to Second Waiver Request* at 11-12.

⁶⁶ FCC File No. 0002637829 (filed June 2, 2006).

⁶⁷ FCC File No. 0002637832 (filed June 2, 2006).

⁶⁸ FCC File No. 0002637835 (filed June 2, 2006).

⁶⁹ FCC File No. 0002637836 (filed June 2, 2006). MariTEL's notification of construction for the Mississippi River VPCSA was returned for amendment because, as initially filed, it did not mention coverage of the Missouri River, one of the major waterways in that VPCSA, in its substantial service showing. The return letter directed MariTEL to "clarify whether, taking the Missouri River into account, the reported construction meets the safe harbor standard [of coverage over one-third of the major waterways in the VPCSA]." See Notice of Return, Reference No. 4146969 (July 6, 2006). On July 24, 2006, MariTEL filed a Response to Notice of Return, and a revised notification of construction, in which it represented that, even when taking the Missouri River into consideration, MariTEL's coverage encompassed 35% of the coastal areas and navigable waterways in the VPCSA, and provided an explanation of how it calculated that figure as well as a revised coverage map. See MariTEL Mississippi River, Inc., Response to Notice of Return – Reference 4146939 [sic] (filed July 24, 2006); FCC File No. 0002637836 (as amended July 24, 2006).

⁷⁰ FCC File No. 0002637842 (filed June 2, 2006).

⁷¹ FCC File No. 0002637845 (filed June 2, 2006).

⁷² FCC File No. 0002637848 (filed June 2, 2006). MariTEL's notification of construction for the Pacific Northwest VPCSA was returned because the coverage contours in the attached coverage map appeared to be significantly larger than the coverage contours shown in the coverage maps for the other maritime VPCSAs for which notifications of construction were filed. See Notice of Return, Reference No. 4146970 (July 6, 2006). MariTEL was accordingly directed to explain the discrepancy. *Id.* On July 24, 2006, MariTEL filed a Response to Notice of Return in which it explained that the relatively large coverage contours in this VPCSA stemmed from the siting of its base stations at mountaintop locations several thousand feet above sea level. MariTEL noted that, with one exception, its base stations in the other maritime VPCSAs were located at or near sea level, and that base stations at higher elevations have larger coverage areas. See MariTEL Northern Pacific, Inc., Response to Notice of Return – Reference 4146970 (filed July 24, 2006).

⁷³ See, e.g., FCC File No. 0002637829, Notification of Compliance with Substantial Service Requirement at 1.

17. MariTEL did not file notifications of construction for its maritime VPCSA licenses covering Hawaii and Alaska or for its inland VPCSA licenses. On July 26, 2006, MariTEL supplemented its waiver requests relating to the Hawaii and Alaska licenses to explain why it continues to need additional time to meet the construction requirements in those VPCSAs even after it has been able to satisfy the construction requirements for the seven maritime VPCSAs in the continental United States.⁷⁴ MariTEL states that it still desires to construct a maritime data network using its authorized VPC frequencies, and asserts that the *AIS Rulemaking Proceeding* continues to affect its ability to do so, in the continental United States just as in Hawaii and Alaska.⁷⁵ MariTEL adds, however, that “[b]ecause of demand from a single entity, MariTEL constructed facilities providing voice communications services in VPCs 001-007 [i.e., the maritime VPCSAs in the continental United States] and provided the Notifications based on that construction.”⁷⁶ That entity has not requested service in Hawaii and Alaska, and, as a consequence, there is no reason for MariTEL to likewise construct a voice system in those VPCSAs.⁷⁷ Thus, MariTEL argues, the submission of the notifications of construction for the maritime VPCSAs in the continental United States does not undermine the rationale for the *Second Waiver Request* or obviate its continuing need for a waiver for the Hawaii and Alaska VPCSAs.⁷⁸ Finally, in an August 15, 2006 filing, MariTEL states that there also remains a need for waivers with respect to the inland VPCSAs, not only because in those VPCSAs, as in Hawaii and Alaska, there is no identified demand for voice service, but additionally because of the continuing uncertainty as to whether Channel 87B will be designated for AIS in the inland VPCSAs.⁷⁹

18. *Discussion.* As a preliminary matter, we dismiss the *Second Waiver Request* as moot with respect to the licenses for the seven maritime VPCSAs in the continental United States. MariTEL has filed notifications of construction representing that it has met the five-year construction requirement for those VPCSAs, and demonstrating how it has satisfied the substantial service safe harbor of coverage over one-third of the major waterways in each of those VPCSAs. Given that MariTEL reached this substantial service benchmark as of May 19, 2006, the end-date of the waiver granted to MariTEL in the *Waiver Order*, which we have here affirmed, MariTEL has no need for additional waiver relief with respect to these seven licenses. We note that MariTEL initially requested waiver relief because it did not want to complete construction of a voice communications system for which there was no perceived demand, and instead desired to construct a data communications system for which it needed an extended construction period, but that MariTEL now represents that it has satisfied the construction requirement in

⁷⁴ See MariTEL Hawaii, Inc., Supplement to Request for Rule Waiver and Extension of Construction Deadline, FCC File No. 0002173635 (filed July 26, 2006); MariTEL Alaska, Inc., Supplement to Request for Rule Waiver and Extension of Construction Deadline, FCC File No. 0002173639 (filed July 26, 2006) (Hawaii-Alaska Supplement).

⁷⁵ See Hawaii-Alaska Supplement at 2. MariTEL asserts that, as a result of the Commission’s decision in the *AIS Report and Order*, “MariTEL is faced with a universe of new technical challenges that make immediate buildout and rollout of its marine data system impractical in all markets [in] which it desired to offer services.” *Id.*

⁷⁶ *Id.* MariTEL states that, absent the voice communications requirements of this customer, and the “unique commercial opportunity” it presents, MariTEL would not attempt to provide voice services in any of the maritime VPCSAs, in part because of the potential interference impact of AIS on VPC voice communications. *Id.* at 2 n.6. It is our understanding that MariTEL is not providing this voice service using all of its authorized VPC channels, so it continues to have channels available for its proposed data system in all of its VPCSAs, including those in which it is providing voice service.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.* at 2.

⁷⁹ See MariTEL, Inc., Supplement to Request for Rule Waiver and Extension of Construction Deadline, FCC File Nos. 0002173651 (pertaining to Station WPTI475, VPC010-Grand Forks ND-MN), 0002173652 (WPTI476, VPC 012-Bismarck ND-MT-SD), 0002173653 (WPTI477, VPC015-North Platte NE-CO), 0002173654 (WPTI478, VPC019-Odessa-Midland TX), 0002173655 (WPTI479, VPC020-Hobbs, NM-TX), 0002173656 (WPTI480, VPC021-Lubbock TX), and 0002173657 (WPTI481, VPC022-Amarillo TX-NM) (filed Aug. 15, 2006).

seven of the maritime VPCSA's though the construction of a voice, rather than a data, communications system. We do not believe that this circumstance undermines either of MariTEL's waiver requests.⁸⁰ We find no basis to question the sincerity of MariTEL's consistently expressed intent to build out a data network, which it has advanced both in support of its waiver requests and in its comments in the *AIS Rulemaking Proceeding*. We also find it reasonable for MariTEL to nonetheless construct a voice system in response to an unexpected commercial opportunity, while at the same continuing its efforts to develop a data network. Having constructed a voice system that in fact satisfies the five-year substantial service safe harbor benchmark, moreover, it was entirely appropriate for MariTEL to submit notifications of construction on that basis. Having thus determined that the *Second Waiver Request* is moot with respect to MariTEL's licenses for the seven maritime VPCSA's in the continental United States, we now turn to the question of whether we should grant the *Second Waiver Request* with respect to MariTEL's licenses for the Hawaii and Alaska VPCSA's and its seven licenses for inland VPCSA's.

19. The Commission, as a general matter, has denied requests for waivers and/or extensions of compliance deadlines that are based on alleged regulatory uncertainty.⁸¹ It is well established that the Commission retains the power to alter the terms of existing licenses by rulemaking.⁸² Accordingly, licensees may not reasonably rely on the continuation without change of the rules in effect when they acquired their licenses, but instead must be prepared to adapt to changes in those rules while continuing to fulfill their regulatory obligations, such as construction requirements. Rules or policies governing a particular licensee can undergo review in a pending rulemaking proceeding at any time, or there could be some other matter pending before the Commission the resolution of which could affect the licensee's operations. Thus, liberally granting rule waivers or extending construction deadlines based on licensee assertions of regulatory uncertainty could undermine administrative efficiency and finality, and potentially result in the warehousing of spectrum. Notwithstanding this concern, however, the Commission has, on occasion, granted waiver relief due to regulatory uncertainty attributable to the pendency of a Notice of Proposed Rule Making.⁸³ In the instant case, we believe that a limited further extension of MariTEL's build-out deadlines is warranted, albeit not to the extent requested by MariTEL.

20. To begin with, MariTEL already was facing some regulatory uncertainty due to the continuing litigation over its first waiver request, when the Commission released the *AIS NPRM* on

⁸⁰ Cf., e.g., *Mobex Network Services, LLC, Order*, 19 FCC Rcd 24939, 24943-44 ¶ 9 (WTB PSCID 2004) (that a licensee ultimately constructed a station in a manner that varied from the intention it expressed in its construction extension request does not invalidate the grant of the extension; when a construction extension is intended to depend on a particular condition, that requirement is set forth expressly), citing *State of Alaska, Memorandum Opinion and Order*, 18 FCC Rcd 16315, 16327-28 ¶ 21 (WTB 2003).

⁸¹ See, e.g., *Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16893 ¶ 11 (2003); *Norris Satellite Communications, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 22299, 22306-07 ¶¶ 16-18 (1997); *EchoStar Satellite Corporation, Memorandum Opinion and Order*, 7 FCC Rcd 1765, 1770 ¶ 26 (1992); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order*, PR Docket No. 93-144, 12 FCC Rcd 18349, 18357 ¶ 14 (WTB 1997); *CAI Data Systems, Memorandum Opinion and Order*, 18 FCC Rcd 22322, 22324 ¶ 8 (IB 2003).

⁸² See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205, 76 S. Ct. 763, 100 L. Ed. 1081 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, 63 S. Ct. 997, 87 L. Ed. 1344 (1943); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319-20 (D.C. Cir. 1995); *WBEN, Inc. v. FCC*, 396 F.2d 601, 617-18 (2d Cir. 1968). It also has been established that the Commission retains this power to alter the terms of existing licenses even with respect to licenses acquired through the auction process. See 47 U.S.C. § 309(j)(6)(c), (j)(6)(D); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2002), cert. denied, 536 U.S. 923, 122 S. Ct. 2589, 153 L. Ed. 2d 778.

⁸³ See, e.g., *DTV Build-Out Order*, 18 FCC Rcd at 22711 ¶ 27; *218-219 MHz Service Order*, 14 FCC Rcd at 5194 ¶¶ 8-9; *Petitions for Waiver of the Emergency Alert System Rules Filed by Various Cable Television Systems, Order*, 20 FCC Rcd 14818, 14820 ¶ 9 (EB 2005).

October 15, 2004. The release of the *AIS NPRM* added to that uncertainty by proposing a redesignation of spectrum for AIS that could have significant implications for all VPC licensees, but that could conceivably affect MariTEL to a greater degree than other VPC licensees insofar as MariTEL is the sole licensee of the maritime VPCsAs.⁸⁴ Thus, the regulatory uncertainty introduced by the *AIS NPRM* was both cumulative and of greater potential significance to MariTEL's use of its licensed VPC spectrum than to any other VPC geographic licensee's use of its licensed spectrum.

21. We disagree with the Coast Guard insofar as it contends that MariTEL faced no meaningful regulatory uncertainty because it should have expected the Commission to adopt the proposals in the *AIS NPRM* with little or no change. As MariTEL notes, the proposals and tentative conclusions set forth in the *AIS NPRM* were just that.⁸⁵ They were not final determinations, and were subject to revision or rethinking based on the record in the *AIS Rulemaking Proceeding*.⁸⁶ It is only when the *AIS Report and Order* was released, on July 24, 2006, that certainty regarding the resolution of these issues could reasonably be imputed to MariTEL with respect to the issues resolved in the *AIS Report and Order*.⁸⁷

22. We believe it is reasonable, under these circumstances, to afford MariTEL additional time to plan and construct its proposed VPC data network. We therefore conclude that a limited further extension of the applicable construction deadlines is warranted under Section 1.925(c)(3)(ii).⁸⁸ As noted,

⁸⁴ For example, the Commission proposed in the *AIS NPRM* to designate Channels 87B and 88B for exclusive AIS use in the maritime VPCsAs, but not in the inland VPCsAs. See *AIS NPRM*, 19 FCC Rcd at 20106 ¶ 63.

⁸⁵ See *Reply to Opposition to Second Waiver Request* at 3-4.

⁸⁶ We therefore disagree with, for example, the Coast Guard's statement that the then-existing record in the *AIS Rulemaking Proceeding* "clearly demonstrates that the Commission has considered MariTEL's interference allegations and dismissed them, concluding that reasonable techniques currently exist to mitigate interference to MariTEL's proposed operations." *Opposition to Second Waiver Request* at 15. Although the Commission did tentatively conclude in the *AIS NPRM* that any AIS interference to VPC communications can be effectively mitigated through commercially reasonable means, see *AIS NPRM*, 19 FCC Rcd at 20097 ¶ 47, the Commission specifically requested comment on that issue, as well as on all other matters pertaining to the technical analysis of AIS-to-VPC interference, reflecting the preliminary and tentative nature of that determination at that juncture. See *id.* (requesting "comment on this tentative conclusion [regarding the availability to VPC licensees of technologies allowing them to operate without interference from AIS communications] and on all aspects of the inCode and JSC interference analyses, including the reasonableness of their assumptions, the accuracy of their methods, and the validity of their conclusions").

⁸⁷ We do not suggest by this that the release of the *AIS Report and Order* should be deemed to provide MariTEL with absolute certainty on all matters discussed therein. As noted above, certain issues raised in the *AIS Rulemaking Proceeding* are still pending resolution, most significantly for present purposes, the issue of whether to designate Channel 87B for AIS in the inland as well as the maritime VPCsAs. See n. 50, *supra*. But the release of the *AIS Report and Order* did provide MariTEL with a great measure of added certainty compared to the situation prior to its release, and, as discussed *infra*, we believe the period of regulatory uncertainty warranting limited waiver relief ended with the release of *AIS Report and Order*.

⁸⁸ See 47 C.F.R. § 1.925(c)(3)(ii). We are not persuaded by the Coast Guard's arguments that grant of this waiver would not serve the public interest because it would permit MariTEL to warehouse spectrum. The Coast Guard suggests that MariTEL has not demonstrated a genuine intent to construct its VPC data network because it did not submit more detailed evidence of its expenditures and efforts to date, and because it has partitioned and disaggregated some of its VPC spectrum in some areas that would appear to be critical to the commercial success of the proposed data service. See *Opposition to Second Waiver Request* at 17, 25-26. We do not agree that the circumstances cited by the Coast Guard demonstrate a lack of sincerity in MariTEL's intentions to construct a maritime data network. See FCC File Nos. 0002438737-39, 0002438741-42, 0002438744, 0002438746, 0002438749, 0002438759 (filed Jan. 20, 2006) (MariTEL applications to assign VPC spectrum to Motorola, but retain the areas within thirty miles of major waterways).

MariTEL requests that it not be required to demonstrate substantial service under Section 80.49 until the later of (a) two years from the date that the Commission's decision in the *AIS Rulemaking Proceeding* "becomes final"; or (b) May 19, 2009, which is MariTEL's ten-year substantial service deadline for its maritime VPCSA licenses. We are not persuaded, however, that we should grant an extension of the duration specifically requested by MariTEL. We do not believe it would serve the public interest to allow this spectrum to remain fallow for such a lengthy period.

23. Extending MariTEL's construction requirements to coincide with the "finality" of the Commission's decisions in the *AIS Rulemaking Proceeding* could, if understood to refer to the date of exhaustion of all judicial challenges, up to and including U.S. Supreme Court review, result in this spectrum remaining unused for several additional years.⁸⁹ As the Coast Guard notes, "the subject frequencies are the last remaining maritime, internationally-interoperable frequencies available."⁹⁰ Such spectrum is needed to alleviate congestion on existing maritime channels, and to enable the provision of new services that may promote maritime safety or homeland security.⁹¹ We believe that this is a factor counseling against granting an extension that would permit the frequencies to remain unused for an indefinite additional period of time. Moreover, we believe that we must balance our determination to afford MariTEL some additional relief from the build-out deadlines against the public interest in putting this spectrum into service without further undue delay.

24. We also believe that MariTEL should not need such an extensive additional period of time following issuance of the *AIS Report and Order* before it can fulfill its substantial service obligation in the Hawaii, Alaska and inland VPCSA's. Even prior to the release of the *AIS Report and Order*, MariTEL had the benefit of the *AIS NPRM*, which discussed a discrete number of possible outcomes, e.g., designating VHF Channels 87B and 88B for exclusive AIS use on a wideband simplex basis, as proposed; permitting use of Channels 87B and 88B for AIS and VPC communications on a shared basis, subject to specified conditions; designating two narrowband channel pairs for AIS; and mandating further negotiations between the Coast Guard and MariTEL. Thus, while not definitively resolving the issues, the *AIS NPRM* clarified and narrowed the range of likely outcomes somewhat, facilitating the ability of MariTEL to develop plans for various contingencies. Given that MariTEL has held the maritime VPCSA licenses since 1999 and has already received a two-year extension of the first build-out deadline, it is not unreasonable to expect MariTEL to have undertaken some preliminary activities to position itself to be able to act quickly to implement its proposed VPC data system once the *AIS Report and Order* was released.⁹² Since July 24, 2006, moreover, MariTEL has been able to make plans with full knowledge of the decisions reached in the *AIS Report and Order*. Although we have rejected the argument that

⁸⁹ Indeed, MariTEL cites no precedent granting an extension of a compliance deadline until the rules to be promulgated in a pending rulemaking proceeding become final in this sense. In countless contexts, applicants are expected to abide immediately by the rules as "finalized" by Federal Register publication of a Commission Report and Order, notwithstanding the possibility, indeed even the pendency, of a judicial appeal. It is precisely because such early compliance generally is deemed both necessary and reasonable that the showing required for issuance of a stay of a Commission order pending judicial review is so demanding. See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (explaining that, to obtain a stay of agency action pending judicial review, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay).

⁹⁰ *Reply to Opposition to Second Waiver Request* at 26.

⁹¹ *Id.*

⁹² In fact, MariTEL represents that it "has continued to develop the technology necessary to offer marine data communications capability" even during the pendency of the *AIS Rulemaking Proceeding*, "engaging in extensive engineering and product development activities...." *Second Waiver Request* at 10.

MariTEL should have acted on the assumption that the Commission would adopt without change its proposals in the *AIS NPRM*,⁹³ MariTEL cannot claim surprise that the Commission ultimately did adopt most of those proposals substantially without change, notwithstanding MariTEL's advocacy of a different approach. We conclude, in sum, that MariTEL has had a significant period of time to develop various contingency plans, especially since the release of the *AIS NPRM*, and that MariTEL no longer experiences significant regulatory uncertainty, beyond that typically faced by Commission regulatees, following the release of the *AIS Report and Order* on July 24, 2006. We therefore believe that granting MariTEL's extension request in full is unnecessary and, in light of the importance of putting the spectrum in question into some meaningful use as soon as reasonably possible, unwarranted as a matter of public policy.

25. Based on the above considerations, we further extend MariTEL's five-year build-out deadline for its Hawaii, Alaska and inland VPCSA licenses to one year following the release date of this *Memorandum Opinion and Order*, conditioned on MariTEL submitting to the Commission, within sixty days of the release date of this *Memorandum Opinion and Order*, a deployment plan explaining how the construction obligations will be satisfied in those remaining areas.⁹⁴ We believe that this extension should provide MariTEL with sufficient additional time to meet its initial substantial service obligations with respect to those licenses, and that this limited measure of additional waiver relief is reasonable in light of the totality of circumstances surrounding this matter, including the earlier, two-year extension; the protracted period during which much of the VPC spectrum licensed to MariTEL has not been used; the ability of MariTEL to develop contingency plans following the release of the *AIS NPRM* in October 2004; and the resolution of significant regulatory uncertainty with the release of the *AIS Report and Order* on July 24, 2006. Under the circumstances, we also find virtue in establishing a date certain for the expiration of the waiver period, rather than providing the waiver relief of open-ended duration that MariTEL seeks. At the same time, we believe it appropriate to condition this relief on MariTEL's submission of a deployment plan to provide some assurance that the substantial service obligations in the Hawaii, Alaska and inland VPCSAs will be met within the additional allotted time period. If MariTEL does not believe that the substantial service requirement for those licenses will not be met within the year, or does not have in place within sixty days a meaningful plan for doing so, we do not believe it would serve the public interest in spectrum efficiency to wait for the full additional year before taking appropriate action with respect to these licenses.⁹⁵

IV. CONCLUSION

26. After reviewing the record, we conclude that the Division's decision to grant MariTEL's request for a waiver of Section 80.49(a)(1) of our Rules and extend MariTEL's five-year construction deadline for its nine maritime VPCSA licenses by two years is reasonable, serves the public interest, and is consistent with precedent. Consequently, we deny the Coast Guard's Application for Review, and affirm the *Waiver Order*. In addition, we believe that, in this unique context, the regulatory uncertainty engendered by the *AIS Rulemaking Proceeding* until the release of the *AIS Report and Order* is a factor

⁹³ See para. 21, *supra*.

⁹⁴ We agree with MariTEL that it is appropriate to extend this relief to the licenses for the inland VPCSAs, which had been subject to an October 9, 2006, five-year substantial service deadline, as well as the licenses for the Hawaii and Alaska VPCSAs. See *Second Waiver Request* at 13. The uncertainty MariTEL faced with respect to the maritime VPCSA licenses applied as well to its inland VPCSA licenses since MariTEL "envision[s] that its service initiation will be consistent across inland and maritime locations." *Id.* Under these circumstances, we believe a consolidation of the build-out deadlines for MariTEL's Hawaii, Alaska and inland VPCSA licenses is consistent with precedent. See, e.g., Intek License Acquisition Corp., *Memorandum Opinion and Order*, 16 FCC Rcd 16431, 16434 ¶ 10 (WTB CWD 2001); National Rural Telecommunications Cooperative, LLC, *Memorandum Opinion and Order*, 15 FCC Rcd 13402, 13404-05 ¶ 8 (WTB CWD 2000).

⁹⁵ See 47 C.F.R. § 1.946(c) (license terminates automatically if licensee does not meet its coverage or substantial service obligations by the expiration of its coverage period).

warranting an additional extension of MariTEL's five-year build-out deadlines for its unconstructed geographic VPC licenses, both maritime and inland, albeit for a lesser period of time than that requested by MariTEL. Specifically, we conclude that, subject to the condition that it submit a deployment plan within sixty days of the release date of this order, MariTEL should be given until one year after the release date of this *Memorandum Opinion and Order* to demonstrate compliance with the five-year substantial service requirement for its Hawaii, Alaska and inland VPCSA licenses, while remaining obligated to satisfy the ten-year substantial service requirement by May 19, 2009, for its maritime VPCSA licenses, and by October 19, 2011, for its inland VPCSA licenses. The Commission will be disinclined to grant further extensions of the build-out deadlines for these licenses in the absence of compelling unanticipated circumstances.

27. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by the United States Coast Guard on January 5, 2004 IS DENIED.

28. IT IS FURTHER ORDERED that the Motion for Extension for Time filed by the United States Coast Guard on June 28, 2005, and the Request to Accept Late-Filed Reply filed by MariTEL, Inc. on August 1, 2005, ARE GRANTED.

29. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request for Rule Waiver and Extension of Construction Deadline filed by MariTEL, Inc., on May 25, 2005, IS DISMISSED IN PART AS MOOT, IS GRANTED IN PART to the extent set forth above SUBJECT TO THE CONDITION that MariTEL submit a deployment plan, within sixty days of the release date of this *Memorandum Opinion and Order*, explaining how the construction requirement for the Hawaii, Alaska and inland VPCSA licenses will be satisfied within one year of the release date of this *Memorandum Opinion and Order*, and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER JONATHAN ADELSTEIN**

*Re: MariTel, Inc.; Request to Extend Construction Deadline for Certain VHF Public Coast Station
Geographic Area Licenses; File Nos. 0001252148 et al.*

I write separately to emphasize the narrow scope of our decision today. We should only rarely allow a waiver of our construction deadlines. I believe that the atypical circumstances and obligations presented by the VHF Public Coast Service are sufficiently unique to warrant a modest amount of additional time to allow MariTel to comply with its construction requirement.

I am particularly pleased that we have conditioned our waiver grant on the submission by MariTel of a deployment plan explaining how the construction obligations will be satisfied in its unserved areas. I also support our willingness to take appropriate action in the event the deployment plan is not sufficiently meaningful to give us the necessary assurance that construction will occur on a timely basis.